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No. 111

In the Supreme Court of the United States

OCTOBER TERM, 1930

GO-BART IMPORTING CO., PHILIP D. GOWEN, AND WILLIAM BARTELS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The memorandum opinion of the District Court (R. 54) is unreported. The opinion of the Circuit Court of Appeals (R. 69) is reported in 40 F. (2d) 593.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 15, 1930. (R. 79.) The petition for certiorari was filed May 12, 1930, and was granted June 2, 1930. (R. 80.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Whether the Circuit Court of Appeals had jurisdiction is dependent upon whether the order of the District Court appealed from was a "final decision," within the meaning of Section 128 of the Judicial Code. (U. S. C., Title 28, Sec. 225; *Ex parte Tiffany*, 252 U. S. 32, 36.) That order denied a motion for the suppression as evidence and for the return of papers alleged to have been seized in violation of the petitioners' rights under the Fourth and Fifth Amendments. (R. 57, 63–64.) Although made in the District Court, the motion was entitled as in proceedings begun by a complaint filed with a United States commissioner charging the petitioners and others with conspiracy to violate the National Prohibition Act. (R. 1, 19–21.) The "Order to Show Cause," signed by District Judge Boynton, declared (R. 1–2):

> Upon reading and filing the complaint *herein verified* by William J. Calhoun on the 5th day of June, 1929, the warrant of arrest *herein issued* by Honorable Garrett W. Cotter on the 5th day of June, 1929 * * * and on motion of J. Edward Lumbard, Jr., attorney for *the defendants*, Philip D. Gowen and William Bartels, and for Go-Bart Importing Company, Inc., it is
>
> Ordered,
>
> 1. That the United States of America, *the complainant herein*, show cause * * * why an injunction should not issue enjoining and restraining the *complainant* * * * from directly or indirectly using as evidence the papers and documents seized * * *.

> 2. That the United States of America, *the complainant herein*, show cause * * * why an order should not issue directing the return of the said papers and documents * * *.

In affidavits filed in support of the order to show cause the petitioners Gowen and Bartels each alleged "1. That he is *one of the defendants in the within action.*" (R. 3, 8.)

Following the filing of opposing affidavits by prohibition officers, affidavits in reply were filed by the petitioners Gowen and Bartels, as well as by others named as defendants in the complaint, in each of which the affiant alleged that "he is a *defendant in this action.*" (R. 33, 35, 36, 37, 38, 40, 45, 48.)

The words which we have italicized in the foregoing references to the record make clear that the motion to suppress was not the commencement of an independent proceeding, but was a motion in the proceedings begun by the complaint filed with the commissioner. The language of the order to show cause, that "Upon reading and filing the complaint herein * * *" (R. 1), indicates that the proceedings on the complaint were transferred from the commissioner to the District Court. Regarding the status of those proceedings, counsel for the petitioners in an affidavit in support of a motion for reargument in the District Court stated (R. 60):

> That your deponent further states that since the said arraignment and holding of

> the defendants in bail, no further proceedings of any kind or nature have been taken against the said defendants and that they are still being held in bail to answer the complaint before the United States Commissioner. The defendants did not waive examination upon arraignment and a date was set for a hearing on the complaint. The hearing date has been adjourned from time to time and no hearing has been held.

This is corroborated by the following statement of the Circuit Court of Appeals (R. 71):

> On the day of their arrest Gowen and Bartels were taken before the United States Commissioner and were held in bail to answer the complaint upon which the aforesaid warrant was issued. * * * Nothing further has been done in the proceeding before the commissioner.

As the sole effect of the order of the District Court was to permit the Government to use the evidence in question at the hearing on the complaint or in any other criminal proceeding which might be brought against the movants, that order did not terminate the proceedings on the complaint. It was therefore not a final decision reviewable by the Circuit Court of Appeals, at least as to the petitioners Gowen and Bartels who were named as defendants in the complaint. *Cogen* v. *United States,* 278 U. S. 221.

But the petitioner Go-Bart Importing Company, Inc., was not a party to the complaint. The motion

was made in its behalf as well as in behalf of the defendants Gowen and Bartels. The company was not a party to and can not be affected by the criminal proceeding. It would seem, therefore, that the order of the District Court appealed from, in so far as it denied the relief prayed by the Go-Bart Company, finally determined the rights asserted by that company and to that extent was a final decision reviewable in the Circuit Court of Appeals. *Ex parte Tiffany*, 252 U. S. 32; *Savannah* v. *Jesup*, 106 U. S. 563; *Gumbel* v. *Pitkin*, 113 U. S. 545; and see *Cogen* v. *United States*, *supra*, p. 225.

The grounds upon which the Go-Bart Company sought the return of its papers and the suppression of their use as evidence were identical with those advanced by the petitioners Gowen and Bartels. (R. 3–18.) If, therefore, the Circuit Court of Appeals had jurisdiction of the appeal taken by the Go-Bart Company, the question whether the search and seizure were lawful is as fully involved as though the appeal to that court had been properly taken by all the petitioners.

If, on the other hand, this Court should be of opinion that the proceedings in the District Court were not severable as to the Go-Bart Company, and that the order of the District Court denying the motion to suppress, etc., was not a final decision as to any of the petitioners, it will, without passing on the merits of the controversy, reverse

the judgment of the Circuit Court of Appeals with direction to dismiss the appeal erroneously taken to that court. *Rexford* v. *Brunswick-Balke Co.*, 228 U. S. 339, 345–346; *Blacklock* v. *Small*, 127 U. S. 96, 105; *M. C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, 382–386; *The Assessor* v. *Osbornes*, 9 Wall. 567, 575.

STATEMENT

On June 5, 1929, a warrant for the arrest of petitioners Gowen and Bartels and others was issued by a United States Commissioner for the Southern District of New York directed to the Marshal for that district. (R. 18.) The warrant was based on a complaint of Special Agent in Charge Calhoun, of the Bureau of Prohibition, verified June 5, 1929, which charged the accused with being parties to a conspiracy to violate the National Prohibition Act, but failed to show any facts sustaining the charge or justifying the issuance of the warrant. (R. 19–21.)

Certified copies of the warrant and complaint were placed in the hands of Prohibition Agent O'Brien, who, on June 6, 1929, went to the office of the Go-Bart Importing Company, accompanied by two other agents, and arrested petitioners Gowen and Bartels, the president and secretary and treasurer, respectively, of the company. The persons of Gowen and Bartels and the offices of the company were thereupon searched and various

papers and documents seized and removed to the offices of the prohibition authorities. (R. 31–33.) Following their arrest, Gowen and Bartels were arraigned before the commissioner and, failing to waive a hearing, were held in bail for their further appearance before that officer. (R. 60, 71.)

In August, 1929, while the hearing on the complaint was still pending before the commissioner, a motion was filed in the District Court for the Southern District of New York, in behalf of the Go-Bart Company and of Gowen and Bartels, for the return of the documents and papers to the petitioners and the suppression of their use in evidence.[1] (R. 1, 3–21.) Pursuant to such motion the District Court issued an order to show cause (R. 1–2), to which affidavits were filed in response.

The affidavit of Ernest Braidwood (R. 21–28), an informer but not a Government employee, alleged that from March, 1927, to September, 1928, he dealt with petitioners Gowen and Bartels (hereinafter, for brevity, referred to as the petitioners) directly in the offices in which they were arrested, buying liquor from them, receiving instruction in the methods of conducting their business of importing and selling liquor, visiting their hidden store-

[1] Some of the documents and papers were alleged to belong to the Go-Bart Company (R. 14), but no attempt was made in the affidavits to segregate those belonging to the corporation from those of the individual petitioners, and no point was made in the petition for certiorari based on any technical ownership of the papers in the corporation.

houses, and generally being admitted to the secrets of their illicit business. The affidavit described plans of petitioners to smuggle liquors into the country and showed that petitioners formed the Go-Bart Importing Company, Inc., after the advent of prohibition, for the express purpose of handling liquor. The affidavit clearly establishes that for more than eighteen months petitioners were continuously and feloniously engaged in a conspiracy to violate the National Prohibition Act.

The affidavit of William J. Calhoun, Special Agent in Charge (R. 28–30), set forth that all these facts were communicated to him by Braidwood and that he had by independent means checked and verified them and had in turn communicated them to his subordinate, Prohibition Agent O'Brien, who made the arrests and seizure.

O'Brien's affidavit (R. 30–33) stated that he arrested petitioners in the office of the Go-Bart Company; that a search of the persons of petitioners and the immediate premises disclosed both liquors and documents vital to the conduct of the criminal enterprise; and that these were seized. No demand was made in this proceeding for the return of the liquor.

Affidavits by the two prohibition agents who accompanied O'Brien, relating the details of the arrests and the search and seizure, were also filed. (R. 50–54.)

After a hearing the District Court denied the motion for the return of the papers. (R. 54–57, 64.) A motion for rehearing was also denied. (R. 59–63, 64.) On appeal the Circuit Court of Appeals affirmed the order of the District Court except in one respect (not material here), as to which it modified the order. (R. 69–79.) This Court thereafter granted a writ of certiorari to review the judgment of the Circuit Court of Appeals. (R. 80.)

SUMMARY OF ARGUMENT

The Government concedes that the warrant of arrest, directed to the United States Marshal, conferred no authority upon Prohibition Agent O'Brien to make the arrests in this case. It submits, however, that his possession of that warrant did not deprive him of any right he otherwise had to make the arrests without a warrant.

It is a well-recognized principle of the common law that where a felony has in fact been committed a private person may without a warrant arrest one who he has reasonable ground to suspect committed it.

That the petitioners Gowen and Bartels had committed the felony of conspiring to violate the National Prohibition Act appeared from the affidavit of the informer Braidwood. Their commission of that felony was confirmed by the affidavit of Special Agent in Charge Calhoun, that he had made independent investigations which had corrob-

orated in every particular the facts stated in Braidwood's affidavit.

The "reasonable ground of suspicion" which gives the right at common law to arrest without a warrant is not the equivalent of the "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," which will justify the issuance of a warrant under the Fourth Amendment. That constitutional provision is satisfied only by a sworn declaration of *facts within the knowledge* of the one making the oath showing probable cause to believe that the person to be arrested had committed the offense charged, or that the property to be seized is unlawfully possessed on the premises to be searched. It applies, however, only to the issuance of warrants and does not in any way impair the settled principles of the common law respecting arrests without warrants. The right at common law to arrest without a warrant for a felony actually committed is not confined to those having *personal knowledge of facts* constituting probable cause for belief that the offense was committed by the one whose arrest is contemplated. On the contrary, it is fully established that such arrests may lawfully be made upon *information* furnishing reasonable ground to suspect such guilt.

Before making the arrests in the instant case Agent O'Brien had been informed by his superior

officer, Calhoun, of facts showing that the petitioners Gowen and Bartels had committed a felony, and that those facts had been fully verified by Calhoun. O'Brien was also aware of the complaint sworn to by Calhoun, which, although legally insufficient, nevertheless afforded O'Brien additional ground for accepting as true the facts disclosed to him by Calhoun respecting the conspiracy charged in the complaint. It is submitted that the information thus possessed by O'Brien was ample to justify a reasonable suspicion on his part that Gowen and Bartels had committed the felony of conspiring to violate the National Prohibition Act, and that his arrest of those petitioners was therefore lawful.

The arrests being lawful, Agent O'Brien had the further right without a warrant contemporaneously to search the immediate premises under the control of those arrested for the "things used to carry on the criminal enterprise," and to seize any of such articles which he might find. *Marron* v. *United States*, 275 U. S. 192, 199; *Agnello* v. *United States*, 269 U. S. 20, 30. The crime for which the arrests were made was a conspiracy extending over a period of more than eighteen months and involving the continuous business of importation, purchase, sale, storage, and transportation of beverage liquors. It was a convenient, if not necessary, means for feloniously conducting this business that the conspirators keep records of their illegal transactions. The books and papers seized

were all of this character, and being used for the commission of the offense for which the arrests were made, as distinguished from mere evidence of such offense, their seizure was lawful. *Marron* v. *United States, supra.*

ARGUMENT

I

THE POSSESSION OF AN INVALID ARREST WARRANT DOES NOT RENDER ILLEGAL AN ARREST WHICH MAY LAWFULLY BE MADE WITHOUT IT

As the warrant of arrest in the possession of Agent O'Brien when making the arrests in this case was directed to the United States Marshal and had issued upon a complaint which stated no facts tending to show that the accused had committed the offense charged, the Government made no attempt below, nor does it seek here, to justify the arrests under the warrant. The evidence, which is in affidavit form, is conflicting as to whether the warrant was used at the time the arrests were made. Agent O'Brien alleged that he made no attempt to serve the warrant, but merely took it with him "for the purpose of reference as to the names of the various defendants." (R. 31, 32.) The agents who accompanied him also alleged that no warrant was served at any time. (R. 51, 53.) This is contradicted by the petitioners, who charge that O'Brien asserted that he had a search warrant and a warrant of arrest and exhibited a paper to justify a search of the offices. (R. 3, 8, 34, 35.) No return was made under the warrant. (R. 32.)

But whether the warrant was served or not is immaterial, for it is well settled that the use of a warrant which is insufficient does not render illegal an arrest or search and seizure which may lawfully be made without it. Thus, in *Stallings* v. *Splain*, 253 U. S. 339, where Stallings, having been indicted in the Federal District Court for Wyoming, was arrested in the District of Columbia by the Marshal of that district upon a bench warrant issued on the indictment to the Marshal of the District of Wyoming, this Court held the arrest to be lawful, saying (p. 342):

> If the bench warrant issued in Wyoming was not effective as a warrant within the District of Columbia, the possession of it did not render illegal an arrest which could lawfully have been made without it. It would, at least, serve as evidence that Splain had reasonable cause to believe that a felony had been committed by Stallings.

In *Marron* v. *United States*, 275 U. S. 192, the Court, although holding that the search warrant which had been served did not justify the seizure of a ledger and certain gas, electric light, water, and telephone bills, because those articles were not named in the warrant, nevertheless sustained the seizure as valid, without regard to the warrant, because incident to a lawful arrest made by the officers. See also *Vachina* v. *United States* (C. C. A. 9th), 283 Fed. 35, 36; *Fryar* v. *United States* (C. C. A. 6th), 3 F. (2d) 598; *Billingsley* v. *United*

States (C. C. A. 8th), 16 F. (2d) 754, 756; *Lee Kwong Nom* v. *United States* (C. C. A. 2d), 20 F. (2d) 470.

II

THE ARRESTS IN THIS CASE COULD LAWFULLY BE MADE WITHOUT A WARRANT

That the petitioners Gowen and Bartels had, prior to their arrests, committed the felony of conspiring to violate the National Prohibition Act, appears from the affidavit of the informer Braidwood (R. 21–28), the recitals of which the petitioners make no attempt to deny. The commission of that offense is also established by the affidavit of Special Agent in Charge Calhoun, that prior to the arrests he had made independent investigations which had corroborated in every particular the facts stated in Braidwood's affidavit. (R. 29.) It is a well recognized rule of the common law that where a felony has in fact been committed a private person, as well as a peace officer, may without a warrant arrest one who he has reasonable ground to suspect committed it. The rule is of great antiquity. Regarding its origin, Holdsworth in his "History of English Law," 1903 Ed., Vol. 1, p. 131, says:

> Under the older statutes which regulated the preservation of the peace—the Assizes of Clarendon (1166) and Northampton (1176) and the Statute of Winchester (1285)—the duty of apprehending criminals devolved upon the inhabitants at large.

> The Assize of Arms (1181) and the Statute of Winchester contained provisions which defined the arms which all free men must carry. All were obliged to pursue the criminal when the hue and cry was raised. Neglect of these duties entailed an amercement of the individual, the township, or the hundred. The sheriffs and the constables were under special obligations, as conservatores pacis, to fulfil these duties. After the jurisdiction of the justices of the peace was established these duties devolved upon them. But the statutes which defined their powers gave them no further power to apprehend criminals than that possessed by private persons. They might arrest persons actually committing, or who had actually committed a felony; or they might arrest a person if *they themselves* suspected, on reasonable grounds, that a felony had been committed.

With reference to this right of arrest, Lord Mansfield, in *Ledwith* v. *Catchpole,* Cald. Cas. 291, 294–295, said:

> The first question is, whether a felony has been committed or not? and then the fundamental distinction is, that, if a felony has actually been committed, a private person may as well as a peace officer arrest: if not, the question always turns upon this, was the arrest *bona fide*: was the act done fairly and in pursuit of an offender, or by design or malice and ill will? Upon a highway robbery being committed, an alarm spread and

> particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea ports, it would be a terrible thing, if under probable cause an arrest could not be made: and felons usually are taken up upon descriptions in advertisements. Many an innocent man has been and may be taken up upon suspicion: but the mischief and inconvenience to the public in this point of view is comparatively nothing.
>
> It is of great consequence to the police of the country.

In the report of *Samuel* v. *Payne*, 1 Dougl. 359, Eng. Rep., Full Reprint, Vol. 99, p. 230, which was tried before the same great jurist, it is stated (p. 231):

> At the trial, his Lordship, and the counsel on both sides, looked upon the rule of law to be, that, if a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate * * *.

See also remarks of Lord Tenterden in *Beckwith* v. *Philby*, 6 Barn. & Cres. 635, 638; 1 Hale P. C. 587–588; 2 Hawk. P. C., 6th ed., 118–119; 4 Bl. Com. 293.

The rule is equally well established in this country. Wharton, Crim. Law, 7th Ed., Sec. 2933; Bishop, New Criminal Procedure, 2d Ed., Sec. 181 (2). In the early New York case of *Holley* v. *Mix*, 3 Wend. 350, Chief Justice Savage, who presided, said (p. 353):

> My understanding of the law is, that if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on. These principles will be found, substantially, in 1 Chitty's Crim. Law, 15.

Later the Court of Appeals of that State in *Burns* v. *Erben*, 40 N. Y. 463, said (p. 466):

> As a general principle, no person can be arrested or taken into custody without warrant. But if a felony, or a breach of the peace, has, in fact, been committed by the person arrested, the arrest may be justified, by any person, without warrant, whether there was time to procure a warrant or not; but if an innocent person be arrested upon suspicion by a private individual, such individual is not excused unless such offense has, in fact, been committed, and there was reasonable ground to suspect the person arrested.

Other State court decisions giving effect to the rule are *Reuck* v. *McGregor*, 3 Vroom. 70, 74;

Brockway v. *Crawford,* 3 Jones (N. C.) 433, 439; *Teagarden* v. *Graham,* 31 Ind. 422, 424; *State* v. *Holmes,* 48 N. H. 377, 378–379; *Commonwealth* v. *Grether,* 204 Pa. 203, 205.

The rule was plainly recognized by this Court in *Kurtz* v. *Moffitt,* 115 U. S. 487, where it was said (pp. 498–499, 504):

> By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate.
>
> * * * * *
>
> The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been generally held by the courts of the several States to be in force in cases of felony punishable by the civil tribunals.

In *Brady* v. *United States* (C. C. A. 6th), 300 Fed. 540 (certiorari denied, 266 U. S. 620), where prohibition agents, having information that a distillery would be robbed and the liquor removed in described automobiles, stopped and searched the automobiles when they appeared and placed their occupants under arrest, it was contended that the arrests were illegal because prohibition agents are not peace officers or otherwise vested with authority to make arrests. The Circuit Court of Appeals held that it was unnecessary to determine whether the agents, by virtue of their official capacity, had

the right to make the arrests because under the circumstances of the case such authority inhered in them as private persons. In the course of its opinion, the court said (p. 543):

> It is well established that the right of arrest without warrant by a private person, in the absence of restrictive statutes, goes at least this far: That if a felony has in fact been committed, he may so arrest one who is committing it in his presence, or whom he has reasonable ground to suspect of having committed it. * * *
>
> In the circumstances of this case, as hereinabove set forth, a private person would have been justified in arresting the defendants, without a warrant and in taking from them the evidences of their crime, either on the ground that a felony had been committed by the unlawful taking of the whisky from the bonded distillery and that there was a reasonable basis for the belief that the defendants were guilty of this felony, or on the ground that the conspiracy to transport the liquor in violation of law was being carried out in the very view of the arresting parties and that the arrest was clearly calculated to prevent the successful consummation of the object of the conspiracy.

The authorities cited clearly establish that if Prohibition Agent O'Brien had reasonable ground to suspect that the petitioners, Gowen and Bartels, had committed a felony, his arrest of those petitioners was lawful. The petitioners insist that he

did not have such reasonable ground of suspicion because he had no *personal knowledge of facts* upon which it could be based. Their argument is based upon the theory that the "reasonable ground of suspicion" which will justify an arrest without a warrant at common law is the equivalent of the "probable cause," without which, "supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," a warrant may not lawfully issue under the Fourth Amendment.

It is doubtless true that under that Amendment a warrant, either for arrest or for search and seizure, may issue only upon a statement under oath or affirmation, either of the officer seeking the warrant or of some other person, of facts or circumstances within the knowledge of the affiant showing probable cause to believe that the person to be arrested had committed the offense charged, or that the property to be seized is unlawfully possessed on the premises to be searched. *Ripper* v. *United States* (C. C. A. 8th), 178 Fed. 24, 26; *Veeder* v. *United States* (C. C. A. 7th), 252 Fed. 414, 418; *United States* v. *Keleher* (App. D. C.), 2 F. (2d) 934, 935; *Schencks* v. *United States* (App. D. C.), 2 F. (2d) 185, 186–187; *United States* v. *Tureaud* (E. D. La.), 20 Fed. 621, 623. But these are requirements for the issuance of warrants. They were not designed to apply in cases where arrests without warrants could lawfully be made

under the settled principles of common law. It was so held by the Supreme Court of Pennsylvania, with reference to substantially identical provisions of the Constitution of that State, in *Wakely* v. *Hart*, 6 Binney 316, decided in 1814. In that case the court said (pp. 318–319):

> The provisions of this section, so far as concern warrants, only guard against their abuse by issuing them without good cause, or in so general and vague a form, as may put it in the power of the officers who execute them, to harass innocent persons under pretence of suspicion; for if general warrants are allowed, it must be left to the discretion of the officer, on what persons or things they are to be executed. But it is no where said, that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and *pursued* with or without warrant, he may be arrested by any person. And even when there is only probable cause of suspicion, a *private person may* without warrant *at his peril* make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution. The whole section indeed was nothing more than an

> affirmance of the common law, for general warrants have been decided to be illegal; but as the practice of issuing them had been ancient, the abuses great, and the decisions *against them* only of modern date, the agitation occasioned by the discussion of this important question had scarcely subsided, and it was thought prudent to enter a *solemn veto* against this powerful engine of despotism.

Of like import is the statement of the Supreme Judicial Court of Massachusetts in *Rohan* v. *Sawin*, 5 Cush. 281, 284–285:

> It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies.

See also *Snell* v. *Derricott*, 161 Ala. 259, where the Supreme Court of Alabama declared (p. 273): "It is the issue of the warrant, without oath or affirmation, that is forbidden by the Constitution, and not the arrest without a warrant."

The right at common law to arrest without a warrant for a felony actually committed is not confined to those having *personal knowledge of facts* constituting probable cause for belief that the offense was committed by the one whose arrest is contemplated. On the contrary, it is fully established that such arrests may lawfully be made upon *information* furnishing reasonable ground to suspect such guilt. Such is the plain effect of the language of Lord Mansfield in *Ledwith* v. *Catchpole*, quoted above, pp. 15–16.

Other cases in which arrests without warrants for past felonies were sustained, although the arresting officers acted upon information received by them from others, are: *Samuel* v. *Payne, supra; Brady* v. *United States, supra; King* v. *United States* (C. C. A. 9th), 1 F. (2d) 931; *White* v. *United States* (C. C. A. 9th), 16 F. (2d) 870; *Wakely* v. *Hart, supra; Burns* v. *Erben, supra; State* v. *Holmes, supra; Commonwealth* v. *Grether, supra; Commonwealth* v. *Phelps*, 209 Mass. 396; *Brish* v. *Carter*, 98 Md. 445. In the case last cited the Court of Appeals of Maryland said (pp. 449–450):

> Since the cases of *Kirk* v. *Garrett*, 84 Md. 383, *Edger* v. *Burke*, 96 Md. 715, and *B. & O. R. R. Co.* v. *Cain*, 81 Md. 87, it may be regarded as settled in this State that a peace officer may arrest without warrant, whenever he has reasonable grounds to suspect that a felony has been committed; and that it is "wholly immaterial whether the sus-

> picion arises out of information imparted to the officer by some one else, or whether it is founded on his own knowledge." * * *.

The information upon which Agent O'Brien acted in making the arrests in this case was derived from the communication to him by his superior officer Calhoun of the facts set out in the affidavit of Braidwood, as well as from Calhoun's statement to him that he, Calhoun, had by independent investigations verified the facts thus communicated. (R. 21, 30–31.) That information, coupled with his knowledge of the complaint sworn to by Calhoun which, although legally insufficient, nevertheless afforded O'Brien additional ground for accepting as true the facts disclosed to him by Calhoun respecting the same conspiracy was, we submit, ample to justify O'Brien's belief that the petitioners Gowen and Bartels had committed the felony of conspiring to violate the National Prohibition Act. Under the authorities above cited, his arrest of those petitioners without a warrant was therefore lawful.

III

THE ARRESTS BEING LAWFUL, THE CONTEMPORANEOUS SEARCH OF THE IMMEDIATE PREMISES UNDER THE CONTROL OF THE PERSONS ARRESTED AND THE SEIZURE OF THE BOOKS AND PAPERS HERE IN CONTROVERSY AS THINGS USED TO CARRY ON THE CRIMINAL ENTERPRISE WERE LIKEWISE LAWFUL

In *Carroll* v. *United States,* 267 U. S. 132, this Court defined the right to search and seize as incident to a lawful arrest as follows (p. 158):

> When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution. *Weeks* v. *United States,* 232 U. S. 383, 392; *Dillon* v. *O'Brien and Davis,* 16 Cox. C. C. 245; *Getchell* v. *Page,* 103 Me. 387; *Kneeland* v. *Connally,* 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Criminal Procedure (10th edition), Sec. 97.

In *Agnello* v. *United States,* 269 U. S. 20, upon the same subject, it said (p. 30):

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States,* 232 U. S. 383, 392.

In *Marron* v. *United States,* 275 U. S. 192, the Court held that the arrest made in that case was lawful and thereupon stated (p. 199):

> They [the officers making the arrest] had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello* v. *United States, supra,* 30; *Carroll* v. *United States,* 267 U.

S. 132, 158; *Weeks* v. *United States, supra,* 392.

Whether or not the statements quoted from the *Agnello and Marron decisions* were intended to narrow the definition given in the *Carroll case* so as to exclude the right to search for and seize mere evidence, it is at least clear from all three decisions that a lawful arrest confers the right to conduct a contemporaneous search for and to seize the things used in the commission of the crime for which the arrest was made.

The seizure complained of in the *Marron case* was of a ledger and certain bills for gas, electric light, water, and telephone service furnished the premises. In that case prohibition agents in serving a search warrant found one Birdsall in charge of premises described in the warrant which were being used at the time for retailing and drinking intoxicating liquors. The search warrant only authorized a search for and seizure of intoxicating liquors and property designed for their manufacture. The officers served the warrant on Birdsall and after placing him under arrest searched the premises and found quantities of intoxicating liquors, a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business, and also a number of bills for gas, electric light, water, and telephone service furnished on the premises. The ledger and bills, as well as the liquors, were seized, but only the liquors were covered by the search

warrant. This Court held that seizure of the ledger and bills was not authorized by the warrant, but that since Birdsall "was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold" (p. 198), the arresting officers were authorized, in arresting him and in searching the place, to find and seize the things used to carry on the criminal enterprise. The ledger and bills were held to have been properly seized, because they were used for this purpose. In this connection this Court said (p. 199):

> And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. * * * The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

So in the instant case Gowen and Bartels were lawfully arrested for conspiring to violate the National Prohibition Act and continuously conducting on the premises when they were arrested the felonious business of importation, purchase, sale, storage, and transportation of beverage liquors. Manifestly, it was a convenient, if not essential,

means of conducting such a business that the conspirators keep books and records of their illegal transactions. The books and papers which were seized are described in the affidavit of Agent O'Brien as follows (R. 32–33):

> That a further search of the said suite of rooms in which the said defendants were arrested was made and a large number of memoranda, books of account, records, filing cases and other papers were found, all of which pertained on the face thereof to unlawful dealings by the said Gowen and Bartels in intoxicating liquors. These papers included index lists with names and addresses of customers, together with amounts outstanding as payable for liquors; detailed inventories of liquors on hand, received, sold and delivered; detailed records of deliveries of intoxicating liquors to persons within the Southern District of New York and elsewhere; individual receipts for liquor deliveries signed by such customers, ledger accounts setting forth exact purchases of liquors made by particular customers, amounts due thereon, and amounts paid thereon; and letters and other correspondence having to do with the purchase, sale and delivery of intoxicating liquors.

The ledger held by this Court in the *Marron case* to be one of the "things used to carry on the criminal enterprise" which could be searched for and seized as an incident to the lawful arrest made in that case, is referred to in the opinion (p. 194) as "showing inventories of liquors, receipts, expenses,

including gifts to police officers, and other things relating to the business." This, in substance, conforms to the description above given of the books and papers seized in the present case.

To argue, therefore, that the ledger in the *Marron case* was lawfully seized, but that the books and papers in this case were not, is to assert that if the conspirators here had confined the record of their transactions to one volume, its seizure would be lawful, but that because, owing to the magnitude of their operations, their illegal dealings were recorded in a number of books and papers, the latter were immune from seizure. It is submitted that the seizure in this case can not be distinguished in principle from that in the *Marron case.*

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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